No. 91-169

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In the Supreme Court of the United States

OCTOBER TERM, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the federal facilities provision of the Clean Water Act, § 313, 33 U.S.C. 1323, waives the sovereign immunity of the United States from assessment of civil penalties for violation of the Act.

2. Whether the citizen suit provision of the Clean Water Act, § 505, 33 U.S.C. 1365, waives the sovereign immunity of the United States from assessment of federal civil penalties for violation of the Act.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the United States Department of the Interior; C. Dale Duvall, the Commissioner of Reclamation; and the United States Bureau of Reclamation were defendants in the district court and appellants in the court of appeals; the Colorado Environmental Coalition was a plaintiff in the district court and appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of Manuel Lujan, Jr., Secretary of the Interior, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra.*, 1a-19a) is reported at 931 F.2d 1421. The decision of the district court (App., *infra.*, 20a-32a) is reported at 728 F. Supp. 1513.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 39a) was entered on April 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS INVOLVED

Sections 313(a) and 505(a) of the Clean Water Act (CWA), 33 U.S.C. 1323(a), 1365(a), are reproduced at App., *infra*, 41a-44a.

STATEMENT

This case raises the question whether Sections 313 (a) and 505(a) of the Clean Water Act (CWA), 33 U.S.C. 1323(a) and 1365(a), waive the sovereign immunity of the United States from civil penalties assessed for violations of a federally-issued permit authorizing the discharge of pollutants.

1. Sierra Club and Colorado Environment Coalition brought this action under Section 505(a), the citizen suit provision of the CWA, 33 U.S.C. 1365 (a), alleging violations by the Department of the Interior of a federally-issued CWA permit. The permit was issued by the U.S. Environmental Protection Agency in 1975 for discharges from a mine drainage tunnel located near Leadville, Colorado, and owned by the Bureau of Reclamation of the Department of the Interior. Sierra Club sought injunctive relief and civil penalties for violations of the permit. App., *infra*, 2a-3a.

In the district court, the United States moved to dismiss the claim for civil penalties as barred by the federal government's sovereign immunity. The court denied the motion, holding that federal sovereign immunity was waived by Sections 313(a) and 505(a) of the CWA as to penalties. App., *infra*, 20a-32a.

The parties subsequently entered into a consent decree, which settled all claims but those relating to civil penalties. App., *infra*, 4a. As part of the decree, the Department of the Interior agreed to construct a water treatment facility. Consent Decree at

3-4. On May 24, 1990, the district court approved the consent decree and also entered partial summary judgment in which it declared that the Department of the Interior and the Bureau of Reclamation are liable for at least 6333 violations of the CWA between January 13, 1984, and May 12, 1989. Furthermore, the court held that violations are continuing and that federal defendants shall be liable for future violations as they occur. App., *infra*, 35a, 37a-38a.

The district court certified an interlocutory appeal of the civil penalties issue under 28 U.S.C. 1292(b), and the Tenth Circuit granted the unopposed petition of the United States for permission to appeal.

2. The Tenth Circuit affirmed, holding that Sections 313(a) and 505(a) of the CWA, 33 U.S.C. 1323(a) and 1365(a), authorize the assessment of civil penalties against federal agencies for CWA violations. App., *infra*, 1a-18a.

With respect to Section 313(a), the court relied on the statutory language stating that federal agencies "shall be subject to, and comply with, * * * process and sanctions respecting the control and abatement of water pollution." 33 U.S.C. 1323(a). The court rejected the government's argument that the term "sanctions" as used in the above sentence is part of a unitary expression—"process and sanctions"—intended to include injunctive relief and only such sanctions as are necessary to enforce compliance with such relief. App., *infra*, 9a. Instead, the court held that the term "sanctions," as used in that sentence, is broad enough to include civil penalties. App., *infra*, 10a-13a. In so holding, the court followed the Sixth Circuit's decision in *Ohio* v. *United States*

Dep't of Energy, 904 F.2d 1058 (1990), cert. granted, Nos. 90-1341 & 90-1517 (June 3, 1991). See App., *infra*, 11a-12a.

The court also ruled that the language in the CWA citizen suit provision, § 505(a), 33 U.S.C. 1365(a), granting district courts authority "to apply any appropriate civil penalties under [the CWA civil penalties provision § 309(d), 33 U.S.C. 1319(d)]" in a citizen suit, waived federal sovereign immunity from civil penalties. App., *infra*, 13a-15a. The court recognized that, under the civil penalties provision alone, civil penalties would not be available against the federal government, since the federal government is not a "person" whom that provision subjects to civil penalties. App., *infra*, 13a-14a. Nonetheless, the court held that the language subjecting the United States to citizen suits "manifests Congress' consent to the assessment of civil penalties against the United States." App., *infra*, 14a-15a.

REASONS FOR GRANTING THE PETITION

This cases raises issues virtually identical to several of the issues currently before this Court in *United States Dep't of Energy* v. *Ohio*, Nos. 90-1341 and 90-1517. Although *Ohio* presents additional issues not raised by this case, the decision in *Ohio* is likely to control the analysis here. We therefore suggest that this case be held pending this Court's disposition of *Ohio*.

1. In this case, respondents claimed that Section 313(a) waives federal sovereign immunity from civil penalties assessed under the CWA itself. In *Ohio*, the State sought civil penalties under the CWA itself, as well as under the civil penalties provision

of the state water pollution control scheme. This Court therefore has before it in *Ohio* the question whether Section 313(a) waives sovereign immunity from federal civil penalties.[1] The Court's resolution of that question in *Ohio* will likely determine the correct resolution of the same question in this case.

The fact that the State in *Ohio* has an additional basis for claiming civil penalties—state-law provisions for civil penalties, as well as the CWA itself—does not alter the conclusion that the initial inquiry in both cases is the same: whether Section 313(a) authorizes the award of civil penalties against the government at all. Although the *Ohio* case involves an additional issue—whether, if such penalties are authorized, state civil penalties "aris[e] under Federal law" for purposes of the proviso in Section 313(a)[2]—this Court's construction of Section 313(a) in *Ohio* will likely govern this case.

2. The *Ohio* case also raises the same issue as does this case concerning the proper interpretation of Section 505(a) of the CWA, 33 U.S.C. 1365(a). Section 505(a) generally authorizes citizen suits against any entity subject to the CWA—federal, state local, or nongovernmental. It provides that, in a citizen suit, a district court may grant injunctive relief or may

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[1] The first question presented in the petition for a writ of certiorari filed by the United States in *Ohio* was: "Whether Section 313 of the Clean Water Act, 33 U.S.C. 1323, waives the sovereign immunity of the United States from assessment of civil penalties for violation of state water pollution control laws."

[2] Section 313(a) provides that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." 33 U.S.C. 1323(a).

"apply any *appropriate* civil penalties" under the CWA civil penalties provision, 33 U.S.C. 309(d), 33 U.S.C. 1319(d) (emphasis added). Any such civil penalties are payable to the federal Treasury. See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1988). In both *Ohio* and this case, the plaintiffs argued that the above language waives federal sovereign immunity from such civil penalties.

In *Ohio*, the Sixth Circuit did not reach the State's claim that the citizen suit provision waives federal sovereign immunity from civil penalties; this is the first appellate case to have decided that issue. The Sixth Circuit did, however, decide a related question concerning the interpretation of the analogous citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. 6972(a), and this Court granted the State's cross-petition presenting the question "[w]hether Sections 313 and 505 of the Clean Water Act, 33 U.S.C. 1323 [and 1365], waives the sovereign immunity of the United States from assessment of federal civil penalties for violations of the Clean Water Act." 90-1517 Cross-Pet. at i. This Court's resolution of that question in *Ohio* is therefore likely to determine whether the court of appeals correctly resolved the same question in this case.

3. This case involves a potentially large monetary judgment. Pursuant to the partial summary judgment already entered, the district court found the United States liable for penalties for more than 6333 CWA violations;[3] the statutory maximum liability

[3] The district court counted a violation of a single effluent limitation in the permit on a single day as a single violation, thus leading to the court's finding of multiple violations for each day at issue. App., *infra*, 37a.

for each violation is $25,000 per day. 33 U.S.C. 1319 (d). The district court held that the government will also be held liable for the numerous violations that have occurred since. App., *infra*, 38a. Because most of the violations cannot be abated until construction of the water treatment facility is completed, the government's liability continues to mount.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's decision in *United States Dep't of Energy* v. *State of Ohio*, Nos. 90-1341 & 90-1517.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-1183

SIERRA CLUB and COLORADO ENVIRONMENTAL COALITION, PLAINTIFFS-APPELLEES

vs.

MANUEL LUJAN, JR., Secretary of the Interior, THE UNITED STATES DEPARTMENT OF THE INTERIOR, C. DALE DUVALL, Commissioner of Reclamation, and THE UNITED STATES BUREAU OF RECLAMATION, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the District of Colorado (D.C. No. 89-B-0076)

[Filed Apr. 30, 1991]

McKAY, ALDISERT,* and McWILLIAMS, Circuit Judges.

ALDISERT, Circuit Judge.

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* Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

This appeal by the United States Department of the Interior and its Bureau of Reclamation requires us to interpret certain provisions of the Clean Water Act to determine whether Congress has waived the United States' sovereign immunity and authorized the assessment of civil penalties against federal agencies for violations of the Act.

The plaintiffs, Sierra Club and Colorado Environmental Coalition, filed this citizen suit under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), seeking mandatory and declaratory relief and civil penalties against the Department of the Interior and the Bureau of Reclamation for violations of the Act. We conclude that both the plain language of sections 1323(a) and 1365(a) of the Act and its legislative history evidence Congress' intent to waive sovereign immunity and to permit the assessment of civil penalties against the United States, and we affirm the judgment of the district court.

Trial court jurisdiction was proper under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), and 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1292(b), which permits interlocutory appeals, and Rule 5(a), F.R.A.P.

I.

The facts are undisputed. In 1972 Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. § 1251, *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). The Act makes it unlawful to discharge pollutants into navigable waters unless authorized under its specific sections. *Id.* § 1311(a). It also establishes the National System, which allows the Environmental Protection Agency (EPA) to issue

permits authorizing the discharge of pollutants. *Id.* § 1342(a). Upon EPA's approval, a state may administer its own permit program. *Id.* § 1342(b).

The Department of the Interior and the Bureau of Reclamation own and operate the Leadville tunnel in Lake County, Colorado. In 1975 EPA issued the Bureau a National System permit for the Leadville tunnel which required the Bureau to ensure that drainage from the tunnel does not exceed specific effluent limitations and to submit to EPA a schedule for compliance. The EPA has reissued the permit several times.

On January 13, 1989, the Sierra Club and Colorado Environmental Coalition filed a complaint in federal district court alleging that the Interior Department and the Bureau had violated the 1975 National System permit by failing to comply with certain requirements. They asked the court (1) to issue a mandatory injunction enjoining further permit violations, (2) to order the agencies to pay civil penalties and (3) to declare that the agencies are in violation of the CWA. The agencies moved to dismiss the civil penalties claim for lack of subject matter jurisdiction under Rule 12(b)(1), F.R.Civ.P, arguing that the CWA's waiver of sovereign immunity does not include the assessment of civil penalties against the United States. Sierra Club and the Coalition countered with a motion for partial summary judgment on the same issue.

Concluding that the CWA waives sovereign immunity and authorizes civil penalties against the United States, the district court denied the agencies' motion to dismiss on January 19, 1990, and granted the plaintiffs' motion for partial summary judgment. *Sierra Club v. Lujan*, 728 F. Supp. 1513, 1518 (D.

Colo. 1990). On May 24, 1990, the district court approved a consent decree resolving all claims except the request for civil penalties. On June 14, 1990, the district court granted the agencies permission to file an interlocutory appeal under 28 U.S.C. § 1292 (b). This appeal followed.

II.

We review de novo a district court's decision regarding subject matter jurisdiction. *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1273 (10th Cir. 1989). We also review de novo a trial court's grant of summary judgment, which requires us to examine the evidence in the light most favorable to the nonmoving party to ascertain (1) whether any genuine issues of material fact exist and (2) whether the district court correctly applied the relevant substantive law. *Hokansen v. United States*, 868 F.2d 372, 374 (10th Cir. 1989). We may uphold " 'the granting of summary judgment if any proper ground exists to support the district court's ruling.' " *Id.* (quoting *Setliff v. Memorial Hosp. of Sheridan County*, 850 F.2d 1384, 1391-92 (10th Cir. 1988)).

III.

The United States, as sovereign, is immune from suit in the absence of its consent. *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986). "[A] waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed' " by Congress. *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969); *see Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1294-95 (10th Cir. 1990). A court must strictly construe a waiver in favor of

the sovereign and may not extend it beyond what the language of the statute requires. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983).

The arguments raised by the federal agencies in this appeal and the responses of the Sierra Club and the Coalition are grounded on specific provisions of the Clean Water Act. The litigants pick and choose parts of a comprehensive statute to sustain their respective positions. Because certain provisions, at least facially, have the capability of appearing inconsistent, it is necessary to set forth the statutory provisions in detail. We emphasize that our task requires correlating and coordinating parts of each provision. Indeed, in jumping from section to section, we will be fitting together pieces of a statutory jigsaw puzzle.

Our beginning point is Section 313 of the Clean Water Act, 33 U.S.C. § 1323(a), which exposes the federal government to the responsibilities under the Act:

> Each department . . . shall be subject to, and comply with, all Federal . . . requirements . . . and process and sanctions respecting the control and abatement of water pollution . . . The preceding sentence shall apply . . . to any process and sanction . . . notwithstanding any immunity of such agencies, officers, agents, or employees under any law . . . .

Id. From this, we proceed to examine other relevant portions of the Act.

This action is a citizen suit. Accordingly, we must consider the provision that authorizes citizen suits, as well as the statutory penalty provision it incorporates by reference. Commonly known as the citizen suits provision, Section 505(a) of the CWA, 33 U.S.C. § 1365(a), permits private citizens to file complaints

> against any *person (including (i) the United States*, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .

Id. § 1365(a)(1) (emphasis added). The statute further provides:

> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and *to apply any appropriate civil penalties under section 1319(d) of this title.*

Id. § 1365(a) (emphasis added).

The civil penalties authorized in the citizen suits provision are found in Section 309(d) of the CWA, 33 U.S.C. § 1319(d):

> Any *person* who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, *or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator*, or by a State . . . shall be subject to a *civil penalty* not to exceed $25,000 per day for each violation.

Id. § 1319 (d) (emphasis added). The specific civil penalty set forth in section 1319(d), as incorporated by the citizen suits provision, applies here because the

permit for the Leadville tunnel was issued by the EPA under the authority of 33 U.S.C. § 1342.

Two provisions of the Clean Water Act—applicable to all enforcement actions under the Act and thus not limited to citizen suits—also must command our attention. We have referred to one of these before—the provision in section 1323(a) subjecting federal agencies to the CWA and exposing them to stated liabilities. We now set forth this section in detail:

> Each department, agency or instrumentality . . . of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. *The preceding sentence shall apply . . . to any process and sanction, whether enforced in Federal, State, or local courts* or in any other manner. This subsection shall apply *notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.* . . . No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and *the United States shall be liable only for those civil penalties arising under Federal law or im-*

> *posed by a State or local court to enforce an order or the process of such court. . . .*

33 U.S.C. § 1323(a) (emphasis added).

Section 502 of the CWA, 33 U.S.C. § 1362, defines certain terms that are used in the Act. It specifically defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." *Id.* § 1362(5)

Critical to our analysis is the comparison of section 1362(5), which defines "person" as used in the Act *generally*—a definition that does not include the federal government—and section 1365(a) of the citizen suits provision that specifically defines "person" as "including the United States."

With this as the statutory background, we now turn to the contentions of the parties.

IV.

The federal agencies, as appellants, argue that the district court determined incorrectly that the CWA contains an express, unequivocal and unambiguous waiver of sovereign immunity permitting imposition of civil penalties against the United States. They contend that the language and legislative history of the Act do not express Congress' intent to waive sovereign immunity regarding civil penalties. We reject these contentions and hold that both the plain language of section 1323(a) and 1365(a) and the legislative history of the Act authorize the assessment of civil penalties against federal agencies for CWA violations. Specifically, we hold that these two statutory provisions contain language that *ipsissimis verbis* waives sovereign immunity.

The first contention of the Interior Department and the Bureau concedes that section 1323(a) subjects the federal government to the provisions of the CWA and waives sovereign immunity regarding the "requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution." They contend, however, that this waiver does not authorize civil penalties against the United States because such penalties are not "requirements" or "sanctions" as contemplated by the Act.

The words "process and sanctions" must be read together, they argue, to include only those monetary sanctions necessary to ensure compliance with judicial process. The statement in section 1323(a) that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court" has a very limited meaning according to them: It evidences only a waiver of sovereign immunity to traditional sanctions imposed to enforce judicial process and injunctive relief.

To support their interpretation, indeed to support all their contentions in this appeal, the federal agencies point to but one reported case—the district court opinion in *McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986). The *McClellan* plaintiff had brought a citizen suit against the Department of Defense requesting injunctive relief, declaratory relief and civil penalties for violations of the CWA and the Resource Conservation and Recovery Act. *Id.* at 602. After examining section 1323(a), along with the citizen suits provision, 33 U.S.C. § 1365(a), the court determined that Congress had not clearly and unambiguously waived civil penalties against federal facilities. 655 F. Supp. at

605. Noting that section 1323(a) "is a compilation of ambiguity," the court concluded that it was impossible to determine whether Congress meant the "or" after "the United States shall be liable only for those civil penalties arising under Federal law" to be read as an "and" so that "imposed by a State or local court to enforce an order or the process of such court" stands by itself, or whether "civil penalties arising under Federal law" should be followed by the phrase "to enforce an order or the process of such court." *Id.* at 604.

But the *McClellan* case has not enjoyed enthusiastic acceptance. Indeed, it has spawned no progeny. Other courts that have considered this issue, including the district court in this case, have not found as ambiguous the language that worried the *McClellan* trial judge. *See State of Ohio v. U.S. Dep't of Energy*, 904 F.2d 1058 (6th Cir. 1990); *Metropolitan Sanitary Dist. of Greater Chicago v. U.S. Dep't of Navy*, 722 F. Supp. 1565 (N.D. Ill. 1989); *State of Cal. v. U.S. Dep't of Navy*, 631 F. Supp. 584 (N.D. Cal. 1986), *aff'd*, 845 F.2d 222 (9th Cir. 1988). These cases uniformly agreed that the statute's waiver of sovereign immunity as to "sanctions" encompasses civil penalties.

This conflict in the case law—lopsided though it is—gives us our marching orders. When put in proper focus, the threshold question is: Does the term "sanctions" in "process and sanctions" set forth in section 1323(a) encompass "civil penalties"? Unlike the judge in *McClellan*, we have no problem answering this question in the affirmative because we think that the Supreme Court already has supplied the direction.

A "sanction" is "[t]hat part of a law which is designed to secure enforcement by imposing a penalty for its violation." *Black's Law Dictionary* 1203 (5th ed. 1979). The Supreme Court recently has held that civil penalties authorized by the CWA may be sanctions. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987); *United States v. Ward*, 448 U.S. 242, 249 (1980). It bears emphasis that the same section 1323(a) that discusses "process and sanctions" also states that the United States shall be liable for "civil penalties." Thus, the sanctions authorized by section 1323(a) are also penalties, particularly when the same statute also permits "those civil penalties arising under Federal Law."

B.

The reasoning expressed by the courts other than *McClellan* supports our conclusion that federal immunity has been waived here. The Court of Appeals for the Sixth Circuit held in *State of Ohio v. U.S. Department of Energy* that the express language of section 1323 "limits its waiver of sovereign immunity for civil penalties to those 'arising under federal law.'" 904 F.2d at 1061. Even the dissenting judge agreed that the language of section 1323 "undoubtedly encompasses civil penalties," *id.* at 1067 (Guy, J., dissenting), although Judge Guy disagreed with the conclusion that Ohio's cause of action arose under federal law. Unlike the permit in the case at bar, which the EPA issued under the authority of 33 U.S.C. § 1342, the *State of Ohio* permit was issued by the state under Ohio's statutory scheme. *See* 904 F.2d at 1068 (Guy, J., dissenting).

In *Metropolitan Sanitary District of Greater Chicago v. U.S. Department of Navy*, the district court

noted that the purpose of the CWA "was to achieve compliance with new standards, not to simply compensate for injuries caused by existing practices," and that assessing penalties against federal facilities for CWA violations is entirely consistent with these goals. 722 F. Supp. at 1569. The court found "no special reason to adopt an artificially narrow construction of the language of § 1323(a)'s waiver of sovereign immunity." *Id.* Significantly, the court also observed that some courts interpret the term "requirements" in section 1323(a) to include penalties, *see, e.g., State of Me. v. Department of Navy*, 702 F. Supp. 322, 328 (D. Me. 1988), and commented that even if "requirements" does not refer to penalties, they surely are encompassed in the statute's provision that federal agencies shall be subject to " 'all . . . sanctions respecting the control and abatement of water pollution.' " 722 F. Supp. at 1570. Like the court in *State of Ohio*, the district court concluded that the language of section 1323(a) waives immunity as to civil penalties *arising under federal law. Id.* at 1570-72; *see State of Cal. v. U.S. Dep't of Navy*, 845 F.2d at 224-25 (holding that section 1323(a) authorizes civil penalties against federal facilities but does not permit states to seek such penalties).

C.

The Supreme Court has cautioned us not to "import [total] immunity back into a statute designed to limit [governmental immunity]." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). It has warned that " '[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been an-

nounced.'" *Block v. Neal*, 460 U.S. 289, 298 (1983) (quoting *Anderson v. John L. Hayes Const. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.)).

We therefore decline to accept the agencies' invitation to adopt the reasoning and decision in *McClellan*. We conclude that the interpretation of section 1323(a) offered by that district court is unduly restrictive. We hold that section 1323(a) expressly authorizes the courts to assess civil penalties against federal agencies for violations of the CWA. Not only does the term "sanctions" encompass civil penalties, but this section also does not limit the use of such penalties merely to ensure compliance with judicial process. It clearly states that the waiver of immunity applies "to *any* process and sanction, whether enforced in Federal, State, or local courts *or in any other manner*." 33 U.S.C. § 1323(a) (emphasis added). It also makes the United States liable for "civil penalties arising under Federal law." *Id.*

Because this lawsuit is based on alleged violations of a National System permit issued by the EPA, it arises under federal law. Thus, the district court did not err in determining that Congress had consented to the assessment of civil penalties against the United States through the enactment of section 1323(a).

V.

The federal agencies next contend that the definition of "person" in the section applicable to the CWA *generally* pointedly excludes the federal government from the assessment of penalties. This section defines "person" as "an individual, corporation, partnership, association, State, municipality, commission,

or political subdivision of a State, or any interstate body." *Id.* § 1362(5).

As we have observed before, however, this general definition of "person" conflicts with the specific definition of "person" in the citizen suits provision allowing private citizens to file complaints "against any person (including (i) the United States)." *Id.* § 1365(a). The district court rejected the general definition of "person" in section 1362(5) in favor of the specific definition in the citizen suits statute, 33 U.S.C. § 1365(a). 728 F. Supp. at 1518. The court concluded that Congress expressly provided for the assessment of civil penalties against the United States under section 1319(d) when it enacted the citizen suits provision. *Id.*

Relying again on *McClellan*, the agencies argue that the definition of the word "person" in section 1319(d) must be supplied by section 1362(5), and not by section 1365(a). We agree with the district court in this case that the general definition in section 1362(5) does not trump the definition of "person" in the citizen suits statute, 33 U.S.C. § 1365(a). We have held that "a specific statutory provision will govern notwithstanding the fact that a general provision, standing alone, may include the same subject matter." *United States v. Precon*, 695 F.2d 1236, 1243 (10th Cir. 1982). Applying this principle, we reject the reasoning in *McClellan* here as well, and conclude that the definition of "person" as used in section 1319(d) must be provided by the specific citizen suits provision, 33 U.S.C. § 1365(a), which includes the United States.

The case before us is a citizen suit. Thus, we will consider definitions under the citizen suits provision and not the general provision of the Clean Water Act.

The district court determined correctly that section 1365(a)'s reference to the penalty provision in section 1319(d) manifests Congress' consent to the assessment of civil penalties against the United States.

VI.

Finally, the federal agencies challenge the district court's determination that the legislative history of the CWA evidences Congress' intent to waive sovereign immunity regarding all civil penalties. They contend that the court improperly construed congressional silence in the CWA as a waiver of sovereign immunity. They also object to the district court's analogy to the legislative history of the Clean Air Act.

Because we hold that the language of sections 1323(a) and 1365(a) expressly waives the United States' sovereign immunity as to civil penalties, it is not necessary to delve into legislative history to justify our decision; the statutory language reveals Congress' intent. However, had it been necessary to resort to legislative history, we would hold that this history is not inconsistent with what we perceive to be the Congressional intent clearly expressed in the statutory language.

A.

In 1977 Congress amended the CWA in response to two Supreme Court decisions, *Hancock v. Train*, 426 U.S. 167 (1976), and *Environmental Protection Agency v. California*, 426 U.S. 200 (1976), which held that the Federal Water Pollution Control Act and the Clean Air Act "did not clearly and unambiguously demonstrate congressional intent to subject federal facilities to state permit requirements."

Sierra Club v. Lujan, 728 F. Supp. at 1517. Congress specified in the 1977 amendment that federal facilities must comply with *all* requirements regarding pollution control, whether substantive or procedural, including "process and sanctions." *Id.*; *see United States v. State of Wash.*, 872 F.2d 874, 878 (9th Cir. 1989).

In its report on the CWA Amendments of 1977, the Senate Committee expressed the purpose of the amendments:

> This act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by the Federal agencies, has misconstrued the original intent.

S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Cong. Code Cong. & Admin. News 4326, 4392. The district court here concluded that "[a]lthough the Senate Committee did not expressly mention civil penalties . . . such sanctions are included in the Committee's emphatic statement that federal facilities are subject to 'all of the provisions' of state and local pollution regulations." 728 F. Supp. at 1517; *accord Metropolitan Sanitary Dist. of Greater Chicago v. U.S. Dep't of Navy*, 722 F. Supp. at 1571.

The district court also determined that the legislative history of the Clean Air Act clearly indicates Congress' intent to waive the United States' immunity for civil penalties. 728 F. Supp. at 1517. Although the agencies now resist the efficacy of an analogy to the Clean Air Act, they conceded in the

district court that Congress revised the current version of section 1323(a) "to conform with a comparable provision in the Clean Air Act." H.R. Rep. No. 830, 95th Cong., 1st Sess. 93 (1977). The House Report on the Clean Air Act clearly demonstrates Congress' intent to waive sovereign immunity regarding civil penalties:

> This amendment is also intended to resolve any question about the sanctions to which noncomplying Federal agencies, facilities, officers, employees, or agents may be subject. The applicable sanctions are to be the same for Federal facilities and personnel as for privately owned pollution sources and for the owners or operators thereof. This means that Federal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any subject injunction), to *civil and criminal penalties*, and to delay compliance penalties.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 200, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1077, 1279 (emphasis added).

Like a broken record, the agencies cite only *McClellan* to support their argument that the legislative history does not exhibit a consent to assessment of civil penalties. We find the *McClellan* court's analysis to be self-contradicting. On the one hand, it concluded that the CWA's legislative history was of no assistance and that if anything could aid the plaintiff, it was the legislative history of the Clean Air Act. 655 F. Supp. at 604. On the other hand, it refused to accept the Clean Air Act's legislative history as relevant to the CWA. *Id.* at 605. Significantly, the Clean Air Act clearly evidences a waiver of immunity regarding civil penalties. *Id.*

We repeat, for emphasis, that a resort to the legislative history is not necessary because the Congressional intent can be gleaned from the statutory language. Having said that, however, we believe that the legislative history is not inconsistent with our conclusion that the plain language of sections 1323 (a) and 1365(a) reveals Congress' intent to authorize the assessment of civil penalties against federal agencies.

VII.

We conclude, therefore, that Congress has waived the United States' sovereign immunity and authorized the imposition of civil penalties against federal agencies for Clean Water Act violations brought under its citizen suits provision. The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-B-76

CERTIFICATE OF MAILING

I hereby certify that a copy of Order was mailed this 24th day of May, 1990 to the following:

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Magistrate Donald E. Abram

/s/ Carol Henderson
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 89-B-76

SIERRA CLUB and COLORADO ENVIRONMENTAL COALITION, PLAINTIFFS

v.

MANUEL LUJAN, Secretary of the Interior; THE UNITED STATES DEPARTMENT OF THE INTERIOR; C. DALE DUVALL, Commissioner of Reclamation; and THE UNITED STATES BUREAU OF RECLAMATION, DEFENDANTS

MEMORANDUM OPINION AND ORDER

[Filed Jan. 19, 1990]

Babcock, J.

Plaintiffs, Sierra Club and Colorado Environmental Coalition, seek mandatory and declaratory injunctive relief and civil penalties against the United States Department of the Interior (DOI) and the DOI's Bureau of Reclamation (BOR), jointly and severally, pursuant to Clean Water Act (CWA), section 505, 33 U.S.C. § 1365. Plaintiffs allege in their second amended complaint that DOI and BOR (United States or federal defendants) violated and continue

to violate a 1975 National Pollutant Discharge Elimination System (National System) permit issued by the United States Environmental Protection Agency (EPA) to the BOR for its Leadville Mine Drainage Tunnel (tunnel). Pursuant to Fed. R. Civ. P. 12(b)(1), federal defendants move to dismiss plaintiffs' claim for civil penalties on the grounds that this Court lacks subject matter jurisdiction to impose civil penalties against the United States. Plaintiffs have moved for partial summary judgment on the issue. The sole question is whether Congress has waived the United States' sovereign immunity and authorized the assessment of civil penalties against federal agencies for violations of the CWA, 33 U.S.C. § 1251 *et seq.* The issue has been well-briefed by both parties, several States have filed an amicus brief, and oral argument will not assist me in deciding this question. For the following reasons, I deny the federal defendants' motion to dismiss and I grant plaintiffs' motion for partial summary judgment.

The CWA was enacted in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The act's purpose is to secure compliance with new standards and to change existing practices, not merely to compensate for injuries caused by existing practices. In order to achieve these goals, CWA § 301(a) makes discharge of any pollutant into navigable waters unlawful unless authorized in accordance with specified sections of the CWA. *Id.*

One of these specified sections is section 402, which establishes the National System. Pursuant to section 402(a), the EPA Administrator may issue permits authorizing the discharge of pollutants. Upon EPA's approval, CWA § 402(b) allows a state to administer its own permit program. 33 U.S.C. § 1342(b).

Once a National System permit is issued, the permittee's obligation to comply with the regulatory scheme is determined by reference to the terms and conditions of the permit, whether the permit has been issued by the EPA or an EPA approved agency. CWA, § 402(k); 33 U.S.C. § 1342(k).

Plaintiffs allege in their complaint that the DOI and BOR own and operate a tunnel in Lake County, Colorado. Plaintiffs contend that in 1975 EPA issued BOR a National System permit which required BOR to ensure that drainage from the tunnel complied with specific effluent limitations and to submit to EPA a schedule for compliance. The permit was reissued by EPA several times. EPA also issued to BOR its December 1977 Administrative Order establishing a schedule for meeting the 1975 permit effluent limitations. In September 1984, EPA and BOR also entered into an Administrative Stipulation and Agreement that contained a schedule for plugging the tunnel.

Plaintiffs allege that BOR and DOI are in violation of their 1975 National System permit because they have failed to comply with certain permit requirements. In their claim for relief, plaintiffs ask that this Court: 1) issue a mandatory injunction enjoining further permit violations; 2) issue an Order requiring federal defendants to pay civil penalties; and 3) declare that federal defendants are in violation of the CWA. Federal defendants move to dismiss the claim for civil penalties for want of subject matter jurisdiction, arguing that the CWA's waiver of sovereign immunity is not broad enough to permit suits that seek civil penalties against the United States.

It is axiomatic that the United States may not be sued without its consent. *Block v. North Dakota*, 461

U.S. 273, 287 (1983); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). There is no waiver of sovereign immunity unless it is clear and unequivocal. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 734 (1982); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Waiver cannot be implied. *United States v. King*, 395 U.S. 1, 4 (1969). Waivers of sovereign immunity are strictly construed in favor of the sovereign and are not expanded beyond what the language of the statute requires. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983).

Section 313(a) of the CWA, 33 U.S.C. § 1323(a) (Section 313) provides in pertinent part that:

> Each department, agency or instrumentality . . . of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, *shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority and process and sanctions respecting the control and abatement of water pollution* in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local

> courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule. . . . *No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by State or local court to enforce an order or the process of such court.*

33 U.S.C. § 1323(a) (emphasis added).

Section 313, therefore, waives sovereign immunity with respect to "requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution." Federal defendants contend, however, that because § 313 does not expressly consent to suits for "civil penalties," the subsection's waiver of sovereign immunity cannot be construed to extend to civil penalties. Specifically, defendants assert that civil penalties are neither "requirements" nor "sanctions."

Courts are divided on whether civil penalties are included in the term "requirements." *See e.g., Maine v. Dept. of Navy*, 702 F.Supp. 322, 327 (D.Me. 1988) ("Both generically and specifically, such civil penalties are clearly encompassed within the [Resource Recovery and Conservation Act of 1976 (RCRA), 42 U.S.C. § 6961] language 'all . . . requirements, both substantive and procedural.' "); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F.Supp. 601, 604 (E.D. Ca. 1986) (neither § 6001 of the RCRA nor § 313 of the CWA provides for a waiver

of sovereign immunity for civil penalties); *U.S. v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989) (the word "requirements" in § 6001 of the RCRA does not clearly and unambiguously express Congress' intent to waive sovereign immunity regarding the imposition of a civil penalty). Nevertheless, civil penalties clearly are "sanctions" within the meaning of the CWA. *Metropolitan Sanitary Dist. v. Dept. of Navy*, 722 F.Supp. 1565, 1570 (N.D.Ill. 1989); *See Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987); *U.S. v. Ward*, 448 U.S. 242, 249 (1980); *See also Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 282 (1978) (referring to the Clean Air Act's criminal fines and civil penalties as sanctions).

The term "sanction" is defined as, ". . . [T]hat part of a law which is designed to secure enforcement by imposing a penalty for its violation. . . ." Black's Law Dictionary 1203 (Rev. 5th Ed. 1979). *See also* Ballentine's Law Dictionary 1337 (3d ed. 1969) (sanctions are the "imposition of any form of penalty or fine"). Moreover, the United States Department of Justice has commonly used the word "sanction" to include civil penalties. In its comments submitted to the House of Representatives during its consideration of the RCRA, the Justice Department stated:

> This is in response to your request for the views of the Department of Justice on the issue of *criminal and civil penalties* in environmental laws, with specific reference to H.R. 14496, the [RCRA] of 1976.
>
> The Department of Justice favors the inclusion of both *civil and criminal sanctions* for the most effective enforcement of environmental laws. It has been the experience of the Department with

> the Clean Air Act, . . . the Federal Water Pollution Control Act Amendments of 1972, . . . the 1899 Rivers and Harbors Act, . . . and other environmental statutes that *both* sanctions are useful in different situations.

H.R. Rep. No. 1491, 94th Cong., 2d Sess. 83, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6321 (emphasis added).

Similarly, the EPA Administrator, in submitting to Congress comments regarding the enforcement provisions of the 1972 Clean Water Act Amendments, stated:

> Enforcement *sanctions*, including criminal and *civil penalties*, should be available in order to make the Administrator's emergency powers meaningful.

Statement of William D. Ruckelshaus, H.R. Rep. No. 911, 92d Cong., 2d Sess. 161, *reprinted in* 1 Library of Congress, Sen. Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* (Comm. Print 1973) at 848 (emphasis added).

CWA § 313 also contains a limitation on the Act's waiver of sovereign immunity. The limitation provides that:

> No officer, agent, or employee of the United States shall be *personally* liable for any *civil penalty* arising from the performance of his official duties, . . . and the United States *shall be liable* only for those *civil penalties* arising under Federal Law *or* imposed by a State or local court to enforce an order or process of such court.

33 U.S.C. § 1323(a) (emphasis added). There would be no need for Congress to limit federal employees' personal liability for any civil penalties or the federal

government's liability for penalties "arising under Federal law," if it had not already broadly waived immunity from all "requirements" and "sanctions," including civil penalties. *See Metropolitan Sanitary Dist. v. Dept. of Navy*, 722 F. Supp. at 1569-70; *Maine v. Dept. of Navy*, 702 F. Supp. at 329; *California v. Dept. of Navy*, 631 F. Supp. 584, 587 (N.D. Cal. 1986), *aff'd*, 845 F.2d 222 (9th Cir. 1988); *Ohio v. Dept. of Energy*, 689 F. Supp. 760, 766-67 (S.D.Ohio 1988).

Federal defendants further argue, however, that the limitation contained in CWA § 313 "clarifies . . . that the United States is liable only for civil penalties imposed to enforce an order or process of a court." In support of their argument, they cite *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F. Supp. 601 (E.D.Ca.1986). In concluding that CWA § 313 does not waive the United States' immunity from suit for civil penalties the *MESS* court relied largely upon its analysis of similar language in § 6001 of the RCRA. The waiver of sovereign immunity there provides that:

> Each department, agency, and instrumentality of . . . the Federal government . . . *shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief)* . . . in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. *Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanc-*

tion of any State or Federal Court with respect to the enforcement of any such injunctive relief.

42 U.S.C. § 6961 (emphasis added).

The wording of the RCRA differs from the CWA and a conclusion that the former does not permit civil penalties should not be applied automatically to the latter statute. The only clear reference to waiver of sovereign immunity in RCRA § 6001 applies to court ordered sanctions for a violation of an injunction. *U.S. v. Washington*, 872 F.2d 874, 877 (9th Cir. 1989); *Parola v. Weinberger*, 848 F.2d 956, 962 n.3 (9th Cir. 1988). In contrast, CWA § 313 waives sovereign immunity as to "all process and sanctions." *Metropolitan Sanitary Dist. v. Dept. of Navy*, 722 F. Supp. 1565, 1569-70 n.3 (N.D. Ill. 1989).

I hold that by CWA § 313, Congress clearly and unambiguously waived the United States' sovereign immunity for civil penalties, "arising [as here] under Federal Law."

Because CWA § 313 communicates clear congressional intent to waive sovereign immunity and render the federal defendants liable for civil penalties, resort to legislative history is unnecessary. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). Nevertheless, the legislative history supports my conclusion that Congress intended § 313 to waive sovereign immunity regarding the imposition of civil penalties.

In 1977, Congress amended the CWA, the Clean Air Act and the Safe Drinking Water Act in response to the Supreme Court's decisions in *Hancock v. Train*, 426 U.S. 167 (1976), and *EPA v. California*, 426 U.S. 200 (1976). These cases held that the Clean Air Act and the Federal Water Pollution Control Act

did not clearly and unambiguously demonstrate congresisonal intent to subject federal facilities to state permit requirements. In so holding, the Court specifically distinguished substantive requirements of state law respecting control and abatement of pollution from procedural requirements employed to enforce those substantive requirements. *Hancock*, *supra* at 183; *EPA v. California*, *supra* at 215.

The following year, Congress rewrote the three pollution statutes. The 1977 Amendments, which share similar wording, were Congress' reaction to the Supreme Court's prior restrictive interpretations of the term "requirements" and its holding that states were powerless to enforce their pollution laws against federal facilities. Congress specified that federal facilities must comply with *all* requirements regarding pollution control. Congress also added a clarifying sentence, now the second sentence of § 313, explaining that "all" requirements include substantive, procedural, "and any other requirement, whatsoever." In addition, the 1977 Amendments expressly subject federal facilities not only to state administrative authority but also to state process and state sanctions. The clarifying sentence in § 313 adds that the statute applies to "any" process and sanction. With the third sentence in the amended version of § 313, Congress reiterated that no claim of any immunity, including sovereign immunity, should interfere with the application of pollution laws to federal facilities.

In the legislative history to the CWA Amendments of 1977, the Senate Environment and Public Works Committee wrote that the amended version of § 313 "indicate[s] unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws." S.Rep. No. 95-370,

95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S.Code Cong. & Admin. News, 4326, 4392. Although the Senate Committee did not expressly mention civil penalties, I conclude that such sanctions are included in the Committee's emphatic statement that federal facilities are subject to "all of the provisions" of state and local pollution regulations.

Moreover, the legislative history of the Clean Air Act indicates that Congress intended to waive federal agencies' immunity for civil penalties. In describing the section of House Bill 6161, which is now codified as the Clean Air Act's general sovereign immunity waiver, 42 U.S.C. § 7418, the House stated:

> The amendment is also intended to resolve any question about the sanctions to which noncomplying Federal agencies, facilities, officers, employees, or agents may be subject. The applicable sanctions are to be the same for Federal facilities and personnel as for privately owned pollution sources and for the owners or operators thereof. This means that Federal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunction), to civil or criminal penalties, and to delayed compliance penalties.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 200 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1279. The sovereign immunity waiver of House Bill 6161 was adopted by conference committee and subsequently enacted, with minor changes, into law. *See* Conf. Rep. No. 564, 95th Cong., 1st Sess. 137 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 1502, 1518.

Finally, section 505(a) of the CWA, the "citizen suit" provision, permits citizens to sue any person, including the United States, in federal district court to enforce the CWA. 33 U.S.C. § 1365(a). Section 505(a) provides in pertinent part:

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his behalf--
>
> > (1) against any person (including (i) the United States . . .) who is alleged to be in violation of (A) an effluent standard or limitation under this Act . . . The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties under section 309(d) of this Act.

33 U.S.C. § 1365. Thus, citizens may sue any defendant who is alleged to be in violation of an effluent standard or limitation or an EPA or state issued order regarding such a standard or limitation. *Id.* The term "effluent standard or limitation" includes National System permits issued under CWA § 402. CWA § 505(f); 33 U.S.C. § 1365(f). If the citizen prevails in such an action, the court may order injunctive relief and impose civil penalties payable to the United States Treasury. 33 U.S.C. § 1365(a).

Nevertheless, federal defendants argue that federal facilities are not subject to civil penalties under CWA § 309, and therefore, CWA § 505 does not vest this court with jurisdiction to assess civil penalties against the United States. Defendants argue that because CWA § 309(d), 33 U.S.C. § 1319(d) provides that civil penalties are only available against "persons," and the definition of person set forth at CWA § 502

(5), 33 U.S.C. § 1362(5) excludes the United States, the assessment of civil penalties against them would not be "appropriate." Defendants' argument is without merit.

Under § 505(a), federal defendants are included as "persons" against whom penalties may be assessed. Congress' use of the word "appropriate" does not detract from its obvious intent to subject federal defendants to civil penalties. Rather, the word "appropriate" refers to the court's discretion in deciding whether a violation should be penalized and how large the penalty should be. *See Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986). Hence, in authorizing citizen suits under § 505(a), Congress expressly provided for § 309(d) civil penalties. *California v. Dept. of Navy*, 845 F.2d 222, 224 (9th Cir. 1988).

The clear, plain, and unambiguous language of CWA §§ 313 and 505 reveals that Congress expressly determined that federal agencies shall be liable for civil penalties arising under federal law. Moreover, the legislative history of the CWA is entirely consistent with my decision that federal facilities are subject to civil penalties. Accordingly, IT IS

ORDERED that federal defendants' motion to dismiss plaintiffs' complaint for lack of jurisdiction is DENIED.

It is FURTHER ORDERED that plaintiffs' motion for summary judgment is GRANTED.

Dated at Denver, Colorado this 19th day of January 1990.

BY THE COURT:

/s/ Lewis T. Babcock
LEWIS T. BABCOCK
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-B-76

SIERRA CLUB and COLORADO ENVIRONMENTAL COALITION, PLAINTIFFS

v.

MANUEL LUJAN, JR., Secretary of the Interior, THE UNITED STATES DEPARTMENT OF THE INTERIOR, C. DALE DUVALL, Commissioner of Reclamation, and THE UNITED STATES BUREAU OF RECLAMATION, DEFENDANTS

ORDER GRANTING JOINTLY FILED MOTIONS TO (1) ENTER CONSENT DECREE; (2) CERTIFY THE COURT'S JANUARY 19, 1990 ORDER FOR INTERLOCUTORY REVIEW; (3) EXPEDITE RULING ON PLAINTIFFS' MAY 12, 1989 MOTION FOR PARTIAL SUMMARY JUDGMENT; AND (4) STAY ALL OTHER PROCEEDINGS REGARDING CIVIL PENALTIES IN THIS ACTION AND CONTINUE THE DISCOVERY CUTOFF DATE

[Filed May 24, 1990]

Babcock, J.

THIS MATTER is before the Court on the parties' Joint Motion to enter Consent Decree; Defendants'

Motion to Certify the Court's January 19, 1990 Order for Interlocutory Review (to which Plaintiffs do not object); Plaintiffs' Motion to Expedite Ruling on Plaintiffs' May 12, 1989 Motion for Partial Summary Judgment (to which Defendants do not object); and the parties' Joint Motion to stay all other proceedings in this action regarding civil penalties and to continue the discovery cutoff date.

After consideration of the Motions and being fully advised in the premises this Court hereby orders that:

1. This Court's January 19, 1990 Order denying Motion to Dismiss and Granting Partial Summary Judgment is deemed amended to include a statement that: "This Court is of the opinion that the Order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation."

2. A ruling on Plaintiffs' May 12, 1989 Motion for Partial Summary Judgment shall be expedited.

3. The discovery cutoff date in this action is hereby continued.

4. All other District Court proceedings regarding the civil penalties issue, including pleadings or proceedings as to litigation costs incurred by Plaintiffs as to those issues, are stayed pending appeal of the sovereign immunity issue in the Tenth Circuit.

Dated at Denver, Colorado this 24th day of May, 1990.

BY THE COURT:

/s/ Lewis T. Babcock
LEWIS T. BABCOCK
Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-B-76

SIERRA CLUB AND COLORADO ENVIRONMENTAL COALITION, PLAINTIFFS

vs.

MANUEL LUJAN, JR., Secretary of the Interior, THE UNITED STATES DEPARTMENT OF THE INTERIOR, C. DALE DUVALL, Commissioner of Reclamation, and THE UNITED STATES BUREAU OF RECLAMATION, DEFENDANTS

ORDER REGARDING PLAINTIFFS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed May 24, 1990]

In this citizen enforcement action under the Clean Water Act, plaintiffs allege that defendants' discharges from the Leadville Drainage Tunnel (the tunnel), in Lake County, Colorado, have violated and continue to violate effluent limitations set by National Pollutant Discharge Elimination System (NPDES) Permit Number CO-0021717 (the permit). Additionally, plaintiffs allege that defendants have vio-

lated and continue to violate the permit by failing to take "composite samples" when monitoring discharges from the tunnel and by failing intermittently to submit timely discharge monitoring reports.[1] Plaintiffs, in their Second Motion for Partial Summary Judgment, request judgment and a declaration that defendants are liable for violations of the Clean Water Act, that defendants' violations are continuing, that plaintiffs have standing to prosecute this action and that this Court has jurisdiction. Defendants, despite the denials in their Answer, now admit to the Continuing Clean Water Act violations that are the subject of this Order, admit that plaintiffs have standing and admit that this Court has jurisdiction over the action. Federal Defendants' Memorandum in Opposition to Plaintiffs' [Second] Motion for Partial Summary Judgment at 2-3.

Upon consideration of materials submitted by the parties and the applicable law, this Court has determined that there are no genuine issues of fact material to plaintiffs' Motion and that plaintiffs are entitled to judgment on the issues of liability, standing and jurisdiction as a matter of law. Accordingly, the Court hereby finds, concludes, orders and declares the follwing pursuant to the Clean Water Act, 33 U.S.C. §§ 1251-1387, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a):

---

[1] Plaintiffs also have alleged that defendants have violated and continue to violate an administrative order issued by the United States Environmental Protection Agency (EPA) pursuant to the Clean Water Act. Because defendants have admitted the validity of plaintiffs' other allegations of Clean Water Act violations, plaintiffs have withdrawn their allegations with respect to violations of the EPA Order as cumulative.

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Plaintiffs have standing to prosecute this action.

3. Defendants United States Department of the Interior (DOI) and United States Bureau of Reclamation (BOR) have violated the Clean Water Act § 301(a), 33 U.S.C. § 1311(a), consistently since 1975 by discharging pollutants from the tunnel in violation of effluent limitations set by the permit and failing to comply with the permit's monitoring and reporting requirements. Defendants Manuel Lujan, Secretary of the Interior, and C. Dale Duvall, Commissioner of Reclamation, have been in violation of the Act since they assumed their respective positions as officers of the United States whose official duties include causing their agencies to comply with the Clean Water Act. 33 U.S.C. § 1323(a).

4. Defendants DOI and BOR are liable for at least six thousand, three hundred and thirty-three (6333) violations of the Clean Water Act between January 13, 1984 [2] and May 12, 1989, including:

- One thousand, nine hundred and forty-six (1946) days of continuous violation of the permits' effluent limitations for iron, zinc and cadmium (a total of five thousand, eight hundred and thirty-eight (5838) violations);
- Twenty-three (23) violations of the permit's effluent limitation for copper; eleven (11) violations of the permit's limitation for silver;

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[2] Plaintiffs' Second Amended Complaint requests injunctive relief to address continuing violations and civil penalties for violations since January 13, 1984.

- Four hundred and forty-eight (448) violations (over sixty-four (64) months) of the permits' requirement that the tunnel's discharge be monitored monthly for each of seven (7) parameters by taking composite samples; and
- Thirteen (13) violations of the permit's requirement that discharge monitoring reports be postmarked by the 28th day of the month following each reporting period.

5. All the violations referred to in paragraphs 3 and 4 are continuing and all defendants shall be liable for future violations as they occur.

6. Plaintiffs' Second Motion for Summary Judgment, as modified by plaintiffs' Reply Memorandum (filed June 22, 1989), is GRANTED.

Dated at Denver, Colorado this 24th day of May, 1989.

BY THE COURT:

/s/ Lewis T. Babcock
LEWIS T. BABCOCK
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-1183

(D.C. No. 89-B-0076)

SIERRA CLUB AND COLORADO ENVIRONMENTAL COALITION, PLAINTIFFS-APPELLEES

v.

MANUEL LUJAN, JR., Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; C. DALE DUVALL, Commissioner of Reclamation; THE UNITED STATES BUREAU OF RECLAMATION, DEFENDANTS-APPELLANTS

JUDGMENT

Entered April 30, 1991

Before McKAY, ALDISERT,* and McWILLIAMS, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

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* The Honorable Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Sections 313(a) and 505(a) of the Clean Water Act, 33 U.S.C. 1323(a), 1365(a) provide:

§ 1323. Federal facilities pollution control.

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or unoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality

of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with Section 1441 et seq. of Title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order of the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a [*sic*] requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of Section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a par-

ticular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

§ 1365. Citizens suits.

(a) Authorization; jurisdiction.

Except as provided in subsection (b) of this section and Section 1319(g)(6) of this title, any citizen may commerce a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizen-

ship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under Section 1319(d) of this title.

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No. 91-169

In The

Supreme Court of the United States

October Term, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

SIERRA CLUB, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal facilities provision of the Clean Water Act, § 313, 33 U.S.C. § 1323, waives the sovereign immunity of the United States from assessment of civil penalties for violation of a permit issued by the United States Environmental Protection Agency under authority of the Act.

2. Whether the citizen suit provision of the Clean Water Act, § 505, 33 U.S.C. § 1365, waives the sovereign immunity of the United States from assessment of civil penalties for violation of a permit issued by the United States Environmental Protection Agency under authority of the Act.

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No. 91-169

In The

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October Term, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Plaintiffs/respondents Sierra Club and Colorado Environmental Coalition, by their attorney Adam Babich, respectfully submit their Brief in Opposition.

SUMMARY OF THE ARGUMENT

This case is not appropriate for certiorari review. The Tenth Circuit's decision does not conflict with that of

another United States court of appeals. Nor does it conflict with a decision of a state court of last resort. Moreover, the decision below is consistent with and compelled by the plain language of the Clean Water Act. That Act explicitly waives sovereign immunity from any "process and sanctions respecting the control and abatement of water pollution" with the limitation that "the United States shall be liable only for those civil penalties arising under Federal law. . . . " Clean Water Act § 313(a), 33 U.S.C. § 1323(a).

The petition should not be held pending this Court's decision in *United States Dep't of Energy v. State of Ohio*, Nos. 90-1341 & 90-1517, because this case does not present the same issues as the *Ohio* case. The *Ohio* case involves violation of a permit issued by the State of Ohio under authority of state law. Pursuant to an approval by the United States Environmental Protection Agency (EPA), Ohio implements its state law in lieu of the federal Clean Water Act program. *See* Clean Water Act § 402(b), 33 U.S.C. § 1342(b). Thus, the *Ohio* case turns largely on the issue of whether penalties under an EPA-approved state law are "civil penalties arising under Federal law" within the meaning of Clean Water Act § 313(a), 33 U.S.C. § 1323(a). In contrast, this case involves Petitioners' violation of a permit issued directly by EPA.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Respondents cannot improve on the clarity or force of the Tenth Circuit's explanation of the plain language of the Clean Water Act in the decision set forth as Appendix A to the Petition. *Sierra Club v. Lujan*, 931 F.2d 1421 (10th Cir. 1991). Rather than repeating the arguments here, Respondents simply note that the opinion demonstrates that the Tenth Circuit's ruling was compelled by plain, unambiguous statutory language, logic and common sense.

As the Tenth Circuit notes and Petitioners do not dispute, the only contrary opinion is that of the district court in *McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986). Moreover, a subsequent Ninth Circuit opinion calls the McClellan decision into question. Specifically, in *Parola v. Weinberger*, 848 F.2d 956, 962 n.3 (9th Cir. 1988), the Ninth Circuit ruled that language in Clean Air Act § 118, 42 U.S.C. § 7418 – which is substantially identical to language at issue here – shows that Congress "knows how to select language to waive sovereign immunity to criminal penalties and civil damages, if it so intends." In *State of Ohio v. Dep't of Energy*, 904 F.2d 1058, 1060 (6th Cir. 1990), *cert. granted*, 111 S.Ct. 2256 (1991), both the majority and the dissent agreed that the Clean Water Act waives immunity from civil penalties arising under federal law. The dissent stated:

> Analysis of [33 U.S.C.] section 1323(a) . . . leads to the inescapable conclusion that Congress has waived sovereign immunity in the Clean Water Act for all civil penalties arising under federal, but not state, law.

904 F.2d at 1067 (Guy, J. dissenting). There is no contrary holding by a state court of last resort.

Because of the lack of conflict in the circuits and the clarity of the statutory provisions at issue, the Tenth Circuit's ruling is not appropriate for certiorari review. Petitioners' concern about the "potentially large monetary judgment," Petition at 6, should be addressed to Congress. *Cf. H.J. Inc, v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989) (rewriting statutes "is a job for Congress, if it is so inclined, and not for this Court.")

II. THE PETITION SHOULD NOT BE HELD; IT PRESENTS DIFFERENT ISSUES THAN *UNITED STATES DEP'T OF ENERGY v. STATE OF OHIO.*

Petitioners ask this Court to hold the Petition, and thus, delay final resolution of this litigation, pending a decision in *United States Dep't of Energy v. State of Ohio*, Nos. 90-1341 & 90-1517. It is probable, however, that a decision in *Ohio* will not control this case.

In its opinion below, the Tenth Circuit carefully distinguished this case from *Ohio*, noting:

> Unlike the permit in the case at bar, which the EPA issued under authority of 33 U.S.C. § 1342, the *State of Ohio* permit was issued by the state under Ohio's statutory scheme.

Sierra Club v. Lujan, 931 F.2d 1421, 1426 (10th Cir. 1991), Petition, Appendix A, at 11a. This difference is important because the Clean Water Act limits its waiver to, *inter alia*, "civil penalties arising under Federal law. . . . " Clean Water Act § 313(a), 33 U.S.C. § 1323(a). It is doubtful that this Court will reach in *Ohio* the question of sovereign immunity from penalties for violation of EPA-issued permits.

Petitioners state: "In *Ohio*, the State sought civil penalties under the CWA itself, as well as under the civil penalties provision of the state water pollution control scheme." Petition at 4-5. Petitioners are referring to an issue that the Sixth Circuit did not address in *Ohio:* whether penalties may be recovered for a state-issued permit under Clean Water Act § 505(a), 33 U.S.C. § 1365(a) – the Clean Water Act's citizen suit provision.[1] Even if this Court chooses in *Ohio* to decide this issue, the Court's ruling would not necessarily control the instant case – involving an EPA-issued permit. There is no EPA-issued permit at issue in *Ohio*.

Petitioners note that the Sixth Circuit, in *Ohio*, decided an issue "related" to the Tenth Circuit's ruling that the Clean Water Act's citizen suit provision, § 505(a), 33 U.S.C. § 1365(a), waives sovereign immunity. Petition at 6. The *Ohio* court's ruling, however, was under the citizen suit provision of the Resource Conservation and

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[1] Elsewhere, the federal government has acknowledged "The [Sixth Circuit] court of appeals did not reach this issue. . . . " Brief for the Petitioner, *State of Ohio v. United States Dep't of Energy*, No. 90-1341 & 90-1517 (U.S., filed July 25, 1991) at 31, n. 25.

Recovery Act (RCRA), § 7002(a), 42 U.S.C. § 6972(a). Petition at 6. This Court's resolution of the RCRA issue in *Ohio* will not necessarily control the instant case.

In the context of sovereign immunity, the citizen suit provisions of RCRA and the Clean Water Act must be analyzed against the backdrop of the general waivers of sovereign immunity found in RCRA § 6001, 42 U.S.C. § 6961, and in Clean Water Act § 313(a), 33 U.S.C. § 1323(a). It is beyond dispute that these general waivers differ significantly. *See Mitzelfelt v. Dep't of the Air Force*, 903 F.2d 1293, 1295-96 (10th Cir. 1990). Specifically, unlike Clean Water Act § 313(a), 33 U.S.C. § 1323(a), RCRA § 6001 does not explicitly waive immunity for "sanctions." 42 U.S.C. § 6961.

Because the Tenth Circuit found a general waiver of sovereign immunity for violations of federally-issued permits in Clean Water Act § 313(a), the additional waiver in the Act's citizen suit provision [§ 505(a)] is cumulative of, and confirmed by, the Act's general waiver [§ 313(a)]. Accordingly, even if Clean Water Act § 505(a) did not clearly waive sovereign immunity in and of itself (which it does), courts could still use § 505(a) to apply, in the context of citizen suits involving federally-issued permits, the general waiver of Clean Water Act § 313(a).

Because RCRA's general waiver, RCRA § 6001, 42 U.S.C. § 6961, is different from that of the Clean Water Act, a decision about whether RCRA's citizen suit provision waives sovereign immunity – like a decision about Clean Water Act state-issued permits – probably would not control the instant case, which in any event was decided correctly.

CONCLUSION

The petition for a writ of certiorari should be denied and should not be held.

Respectfully Submitted,

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Date: September 17, 1991